

READ INSTRUCTIONS CAREFULLY  
BEFORE PROCEEDING

FEDERAL COMMUNICATIONS COMMISSION  
REMITTANCE ADVICE

Approved by OMB

3060-0589

Page No 1 of 1

(1) LOCKBOX #  
358110

FCC/MILLER FEB 18 2005

SPECIAL USE

FCC USE ONLY

SECTION A - PAYER INFORMATION

(2) PAYER NAME (if paying by credit card, enter name exactly as it appears on your card)

Cole, Raywid & Braverman, LLP

(3) TOTAL AMOUNT PAID (U.S. Dollars and cents)  
225.00

(4) STREET ADDRESS LINE NO. 1

1919 Pennsylvania Avenue, NW, Suite 200

(5) STREET ADDRESS LINE NO. 2

ORIGINAL

(6) CITY

Washington

(7) STATE

DC

(8) ZIP CODE

20006

(9) DAYTIME TELEPHONE NUMBER (include area code)

202-659-9750

(10) COUNTRY CODE (if not in U.S.A.)

FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED

(11) PAYER (FRN)

0003-7879-42

(12) PAYER (TIN)

IF PAYER NAME AND THE APPLICANT NAME ARE DIFFERENT, COMPLETE SECTION B  
IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C)

(13) APPLICANT NAME

Arkansas Cable Television Association

(14) STREET ADDRESS LINE NO. 1

411 South Victory

(15) STREET ADDRESS LINE NO. 2

Suite 201A

EB-05-MD-004

(16) CITY

Little Rock

(17) STATE

AR

(18) ZIP CODE

72201

(19) DAYTIME TELEPHONE NUMBER (include area code)

501-907-6440

(20) COUNTRY CODE (if not in U.S.A.)

FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED

(21) APPLICANT (FRN)

0012789376

(22) APPLICANT (TIN)

COMPLETE SECTION C FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET

(23A) CALL SIGN/OTHER ID

(24A) PAYMENT TYPE CODE

(25A) QUANTITY

TPC

1

(26A) FEE DUE FOR (PTC)

225.00

(27A) TOTAL FEE

225.00

FCC USE ONLY

(28A) FCC CODE 1

(29A) FCC CODE 2

(23B) CALL SIGN/OTHER ID

(24B) PAYMENT TYPE CODE

(25B) QUANTITY

(26B) FEE DUE FOR (PTC)

(27B) TOTAL FEE

FCC USE ONLY

(28B) FCC CODE 1

(29B) FCC CODE 2

SECTION D - CERTIFICATION

(30) CERTIFICATION STATEMENT

I, Rita Tewari

the best of my knowledge, information and belief.

SIGNATURE

, certify under penalty of perjury that the foregoing and supporting information is true and correct to

DATE 2/18/05

SECTION E - CREDIT CARD PAYMENT INFORMATION

(31)

MASTERCARD/VISA ACCOUNT NUMBER:

EXPIRATION

☐ MASTERCARD

☐ VISA

I hereby authorize the FCC to charge my VISA or MASTERCARD for the service(s)/authorization herein described.

SIGNATURE

DATE

ORIGINAL

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

ARKANSAS CABLE  
TELECOMMUNICATIONS  
ASSOCIATION; COMCAST OF  
ARKANSAS, INC.; BUFORD  
COMMUNICATIONS I, L.P. d/b/a  
ALLIANCE COMMUNICATIONS  
NETWORK; WEHCO VIDEO, INC.; and  
TCA CABLE PARTNERS d/b/a COX  
COMMUNICATIONS,

*Complainants*

v.

ENTERGY ARKANSAS, INC.

*Respondent.*

File No. EB-05-MD-004

To: Enforcement Bureau

**POLE ATTACHMENT COMPLAINT**

ARKANSAS CABLE TELECOMMUNICATIONS  
ASSOCIATION; COMCAST OF ARKANSAS, INC.;  
BUFORD COMMUNICATIONS I, L.P. D/B/A  
ALLIANCE COMMUNICATIONS NETWORK;  
WEHCO VIDEO, INC.; AND TCA CABLE  
PARTNERS D/B/A COX COMMUNICATIONS

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February 18, 2005

*Their Attorneys*

## SUMMARY

*Complainants bring this pole attachment complaint in response to Entergy Arkansas' efforts to impose unjust, unreasonable and discriminatory pole attachment terms and conditions on cable operators in Arkansas in violation of 47 U.S.C. § 224.*

In 2001, Entergy hired Utility Support Systems ("USS") to conduct a widespread audit of Entergy's aerial facilities in Arkansas. USS' survey included more than simply counting attachments and determining whether clearance violations exist. The survey collected information valuable and important to Entergy's pole plant management responsibilities, but at Complainants' expense.

Complainants object to Entergy's survey and to its selection of USS conduct the inspections. Even though Entergy contracted with USS *without* any notice to or involvement of the Complainants, Entergy is requiring Complainants to pay nearly all costs associated with USS' inspections. Furthermore, Complainants have found USS' work to be systemically-flawed. USS applies improper engineering and safety standards, and shifts the responsibility of correcting Entergy's own non-compliant facilities to Complainants. Many of the conditions to which Entergy now objects have been long-accepted practices in accordance with the parties' prior course of dealing. As a result, Complainants are forced to bear charges for USS' inspections as well as costs associated with bring facilities into compliance with Entergy's new set of engineering and construction standards.

Essentially, Entergy has turned its back on decades of positive joint-use relationships and is attempting shift the costs all of its plant management and recordkeeping responsibilities to Complainants.

In response to Complainants' unwillingness to assume the full burden of revamping Entergy's pole plant, Entergy imposed a permitting freeze on certain Complainants, refusing to

allow additional cable attachments to Entergy poles until they bring their plants into 100% *compliance with USS' unjust and unreasonable construction standards.* Entergy's intractable position on the permitting freeze has prevented Complainants from expanding their services and left legions of Arkansas residents, who live primarily in rural areas, without access to cable broadband service.

Entergy's conduct is especially egregious because the Commission has previously issued orders issued directly to Entergy,<sup>1</sup> continues the very unjust, unreasonable and discriminatory terms and conditions Complainants are experiencing.

In sum, Entergy made a sweeping conclusion that Complainants facilities caused large scale outages and damage to facilities Entergy suffered at or around the time massive ice storms hit its service area. Rather than take responsibility for its own failures to engineer, construct and maintain its electrical distribution network, Entergy chose to make cable operators the scapegoat, in an effort to avoid investing its own money into its network.

Complainants respectfully request that the Commission declare Entergy's conduct to be unjust, unreasonable and discriminatory in violation of 47 U.S.C. § 224.

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<sup>1</sup> See *Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc.*, 14 FCC Rcd. 9138 (1999); *Cable Texas, Inc. v. Entergy Services, Inc.*, 14 FCC Rcd. 6647 (1999).

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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

ARKANSAS CABLE  
TELECOMMUNICATIONS  
ASSOCIATION; COMCAST OF  
ARKANSAS, INC.; BUFORD  
COMMUNICATIONS I, L.P. d/b/a  
ALLIANCE COMMUNICATIONS  
NETWORK; WEHCO VIDEO, INC.; and  
TCA CABLE PARTNERS d/b/a COX  
COMMUNICATIONS,

*Complainants*

v.

ENTERGY ARKANSAS, INC.

*Respondent.*

File No. EB-05-111D-004

To: Enforcement Bureau  
Federal Communications Commission

**POLE ATTACHMENT COMPLAINT**

**I. PARTIES**

1. This is a Pole Attachment Complaint brought by the Arkansas Cable Telecommunication Association ("Association"), Comcast of Arkansas, Inc. ("Comcast"), Buford Communications I, L.P. d/b/a Alliance Communications Network ("Alliance"), WEHCO Video, Inc. ("WEHCO") and TCA Cable Partners d/b/a Cox Communications ("Cox") (collectively, "Complainants" or "Cable Operator Complainants"), arising from Entergy Arkansas, Inc.'s ("EAI" or "Entergy") efforts to impose unlawful and unreasonable pole

attachment terms and conditions on cable operators in Arkansas.<sup>2</sup> This Pole Attachment

Complaint is brought under 47 U.S.C. § 224, and 47 C.F.R. §§ 1.1401 *et seq.*

2. Complainant Association is a trade association representing the interests of cable television operators in the state of Arkansas. The Association has a general office address of 411 South Victory, Little Rock, Arkansas 72201.

3. Complainant Comcast is a company engaged in the provision of cable television services in Arkansas. Comcast has a general office address of 1020 West Fourth Street, Little Rock, Arkansas 72201.

4. Complainant Alliance is a company engaged in the provision of cable television services in Arkansas. Alliance has a general office address of 290 South Broadview, Greenbrier, Arkansas 72058.

5. Complainant WEHCO is a company engaged in the provision of cable television in Arkansas. WEHCO has a general office address of P.O. Box 2221, Little Rock, AR 72203.

6. Complainant Cox is a company engaged in the provision of cable television services in Arkansas. Cox has a general office address of 4901 S. 48<sup>th</sup> Street, Springdale, Arkansas 72762.

7. Respondent EAI is engaged in the provision of supplying electricity and energy services in the state of Arkansas. EAI possesses a general office address of 425 W. Capitol Avenue, Little Rock, Arkansas 72203.

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<sup>2</sup> Cable Operator Complainants' Rule 1.1404(a) Certifications are set forth at Exhibit 1. Complainants anticipate that additional Cable Operator Complainants may join this action against EAI during the course of this proceeding subsequent to the filing of this Complaint. This Complaint will be supplemented to reflect such additional Cable Operator Complainants as necessary.

## II. JURISDICTION

8. This Commission has jurisdiction over this action under the provisions of the Communications Act of 1934, as amended, including, but not limited to, Section 224 thereof.

9. EAI owns or controls utility poles in the state of Arkansas. Complainants possess attachments on EAI poles pursuant to pole attachment agreements executed with EAI and set forth in Exhibits 2A-2D hereto.<sup>3</sup> Such poles are used for the purposes of wire communications.

10. Upon information and belief, Complainants allege that EAI is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

11. Upon information and belief, Complainants allege that the State of Arkansas, including any of its political subdivisions, agencies, or instrumentalities, does not regulate the rates, terms or conditions of pole attachments in the manner required by Section 224 of the Communications Act. *See States That Have Certified That They Regulate Attachments*, 7 FCC Rcd 1498; 1992 FCC LEXIS 931 (February 21, 1992).

12. Attached to this Complaint is a certificate of service certifying that service was effected on EAI, and each federal, state and local agency which regulates any aspect of services provided by EAI.

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<sup>3</sup>See Comcast Pole Agreement, attached hereto as Exhibit 2A; Alliance Pole Agreement, attached hereto as Exhibit 2B; WEHCO Pole Agreement, attached hereto as Exhibit 2C; and Cox Pole Agreements, attached hereto as Exhibit 2D (collectively "EAI Pole Agreements"). Cox has numerous, but identical, pole agreements with Entergy governing the attachment of Cox's facilities to Entergy poles. For the purposes of administrative efficiency, Cox has provided two sample agreements which set forth the terms and conditions of attachment reflected in each of those agreements. Cox will provide copies of every pole agreement it has with EAI in Arkansas upon request.

### III. INTRODUCTION AND BACKGROUND

13. This Complaint concerns the efforts of the dominant pole owner in the State of Arkansas, Entergy Arkansas, Inc. (formerly Arkansas Power & Light), to impose unjust and unreasonable terms and conditions of attachment on Arkansas cable operators.

#### A. Basics of Pole Attachments

14. Since the very earliest days of the cable television industry, cable television operators like Complainants have relied on the utility poles to string their aerial plant. Indeed, poles have been found time and again to be essential facilities for the provision of cable's services.<sup>4</sup> While the ubiquity of utility poles, and their essential nature to cable operators' business may be intuitive, many aspects of aerial communications, electric and other plant attached to utility poles may not be.

15. The vast majority of utility poles in the country are owned by electric companies. Historically, telephone companies and electric companies owned an approximately equal share

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<sup>4</sup> Utility company pole owners control "virtually the only practical physical medium for the installation of television cables." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987); *See also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362-63 (11<sup>th</sup> Cir. 2002) (noting "essential facilities' doctrine" and detailing Section 224's mandatory access provision to enable use of utility pole networks needed by cable operators); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11<sup>th</sup> Cir. 2002) (cable operators have "little choice but to" attach to utility poles); Common Carrier Bureau Cautions Owners of Utility Poles, 1995 FCC LEXIS 193, \*1 (Jan. 11, 1995) ("Utility poles, ducts and conduits are regarded as essential facilities, access to which is vital for promoting the deployment of cable television systems."); *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5<sup>th</sup> Cir. 1971) (construction of systems outside of utility poles and ducts is "generally unfeasible"). *See, e.g.*, 123 Cong. Rec. H35008 (1977) (statement of Rep. Broyhill, co-sponsor of Pole Attachment Act) ("The cable television industry has traditionally relied on telephone and power companies to provide space on poles for the attachment of CATV cables. Primarily because of environmental concerns, local governments have prohibited cable operators from constructing their own poles. Accordingly, cable operators are virtually dependent on the telephone and power companies. . . ."); 123 Cong. Rec. H5097 (daily ed. May 25, 1977) (statement of Rep. Wirth) ("Cable television operators are generally prohibited by local governments from constructing their own poles to bring cable service to consumers. This means they must rely on the excess space on poles owned by the power and telephone utilities."); S. REP. NO. 580, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles."); H.R. REP. NO. 721, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2 (1977) ("Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional duplicate set of poles to be placed").

of poles in service, but over time, that ownership allocation has shifted dramatically to electric utilities.

16. Cable operators rarely own their own poles because of local government franchise or zoning restrictions and other legal requirements preventing cable operators from setting their own poles. Because cable operators need to use existing poles to construct aerial networks, yet do not—and in most cases cannot—own sufficient pole plant, cable operators have minimal negotiating leverage with pole owners. As a result, Congress passed the Pole Attachment Act of 1978. 47 U.S.C. § 224.

17. The most common kind of utility poles to which cable operators attach their facilities are made of wood. Generally, they vary in height from 30 feet to approximately 65 or more feet. Pole manufacturers produce the various heights in five-foot increments. In other words, they are available at 30 feet, 35 feet, 40 feet, etc.

18. Poles consist of more than what is visible to the casual observer. The lowest portion of the pole is buried in the ground. Generally, 10% of the pole's height, plus two feet is set below ground.

19. The crew setting the pole stabilizes it at the ground level, before placing any facilities on it. Most utilities configure their poles so that electric facilities—which are considered to be the most dangerous facilities on the poles—are at the top of the pole.

20. In pole attachment parlance, the “unusable” space is the part of the pole that is a) below ground and b) that is used to make sure there is adequate ground clearance. The “usable space” is divided into two or three separate areas: 1) the communications space, which is at the bottom of the usable space and 2) the electric space, which is at the top of the pole. The

*communications worker safety zone (“CWSZ”), separates electric lines occupying the top portion of the pole from the communications facilities at the bottom portion of the pole.*

21. The lowest attacher on the pole is usually the incumbent local exchange carrier (ILEC)—such as SBC or ALLTEL. Cable television attachments are most often the next set of cables above the ILECs. Usually, “competitive” telecommunications companies (CLECs) are placed above cable, although sometimes cable and CLEC positions are reversed.

22. Pole attachment license agreements and joint use agreements often contain engineering and construction specifications which include the approximate allocations of pole space among pole occupants.

23. The dominant and central engineering standard that applies to aerial plant is the National Electrical Safety Code (“NESC”). The NESC prescribes separations between facilities located at the pole and at points along spans of communications and electric wires between poles, as well as ground clearances.

24. The NESC and industry practice recognize the core truth that aerial plant is not static, but a dynamic ever-changing physical environment. Poles and wires are affected by atmospheric conditions, such as heat, cold weather and wind. They can soften, droop, sway and/or deteriorate over the course of seasons. The NESC and sound engineering practice take into account these fluctuations and establish separation distances and engineering and construction techniques and standards to provide a safe environment for workers, for the public and for the facilities themselves.

25. Pole owners are not only to ensure that their poles and electric facilities are properly engineered, constructed and maintained, but since the passage of the Pole Attachment

*Act in 1978 they are required to properly administer usage of its poles by other parties by ensuring that the rates, terms and conditions of pole attachments are to be just and reasonable.*

**B. The Parties' Dispute**

26. EAI, almost three years ago, unilaterally engaged a contractor known as Utility Support Systems, Inc. ("USS"). USS' charge was to design and conduct state-wide billing and safety audits of Entergy's pole plant.<sup>5</sup>

27. EAI engaged this contractor without *any* opportunity for cable operators to participate in the contractor selection or audit design process.<sup>6</sup>

28. As a result, Entergy and USS have, through their survey and make-ready orders imposed harsh, unreasonable and discriminatory pole attachment terms and conditions on Arkansas cable operators.<sup>7</sup>

29. As described more specifically below, these surveys consist detailed measurements of at-pole and mid-span clearances, pole ownership, identification, the taking of Global Positioning System ("GPS") coordinates, digital photographs and surveys of the condition of attachments and the poles themselves.<sup>8</sup> Although Entergy brought USS in to be an engineering expert, often the survey results, such as the information USS collects and the make-ready it orders, is defective.

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<sup>5</sup> Declaration of Jeff Gould at ¶¶ 24-25, attached hereto as Exhibit 3.

<sup>6</sup> Declaration of Bennett Hooks at ¶ 16, attached hereto as Exhibit 4; Declaration of Charlotte Dial at ¶ 16, attached hereto as Exhibit 5; Declaration of Jeff Gould at ¶ 19 (Exh. 3).

<sup>7</sup> USS is comprised of, among others, former pole-owner employees from such companies as Georgia Power and BellSouth. Declaration of Bennett Hooks at ¶ 17 (Exh. 4).

<sup>8</sup> See, e.g., Declaration of Marc Billingsley at ¶ 36, attached hereto as Exhibit 6; Declaration of Bennett Hooks at ¶ 32 (Exh. 4). In addition to Entergy, Arkansas cable operators are also grappling with identical issues — and the identical contractor, USS — with Arkansas Electric Cooperatives. While not an issue directly before this Commission, unreasonable practices like those at issue here, left unchecked, are very often replicated by electric cooperatives and deployed against cable operators and others, inhibiting the roll-out of rural broadband. This is of particular concern because cooperatives tend to predominate in rural areas, where broadband is needed most.

30. As set forth in the following pages, the surveys are inaccurate, onerous, unfair and discriminatory.

31. Entergy has responded harshly to Complainants' challenges to the audit. Specifically, and as explained in more detail below, Entergy refused to allow the operators to attach additional cable facilities to Entergy poles unless they pay the survey charges and bear the cost for the make-ready and other plant modifications USS identifies as a result of the surveys.<sup>9</sup>

32. Specifically, Entergy forbids any new attachments to its poles until (a) each and every pole in each and every circuit is brought into what Entergy/USS believes to be code compliance<sup>10</sup> and (b) until all USS and Entergy charges, no matter how unreasonable or discriminatory, are paid in full.<sup>11</sup>

33. By conditioning access to the poles on unjust, unreasonable and discriminatory terms and conditions, Entergy's conduct violates 47 U.S.C. § 224(f).

34. This tactic has harmed, and continues to harm, cable's business in Arkansas by injuring cable's goodwill and damaging its business reputation.

35. Moreover, Entergy's actions have left legions of Arkansas residents who need and want cable broadband without it.<sup>12</sup> This severely undermines federal law and the very policy objectives that prompted Congress to enact the Pole Attachment Act in 1978.<sup>13</sup>

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<sup>9</sup> See, e.g., Letter from Wm. Webster Darling, Senior Counsel, Entergy, to John Brinker, Vice President of Operations, Alliance, dated December 16, 2002, attached hereto as Exhibit 7; Email from an email from John Tabor, USS, to James Peacock, contractor for Comcast, dated March 12, 2003, attached hereto as Exhibit 8; Email from Tony Wagoner, USS, to Marc Billingsley, Comcast, and James Peacock dated February 6, 2003, attached hereto as Exhibit 9.

<sup>10</sup> Declaration of Marc Billingsley at ¶ 27 (Exh. 6).

<sup>11</sup> Letter from W. Darling, Entergy, to J. Brinker, Alliance, dated December 16, 2002. (Exh. 7).

<sup>12</sup> Comcast and Alliance have been prevented—at a minimum—from serving hundreds of subscribers as a result of the permitting freeze. Declaration of Marc Billingsley at ¶¶ 31-31 (Exh. 6); Declaration of Bennett Hooks at ¶ 44 (Exh. 4). Comcast has been blocked from extending service to a new subdivision that will grow to 180 homes due to EAI's freeze on pole access. While the subdivision would likely be financially viable if EAI poles were available, the 2.3 miles cannot be economically constructed otherwise to reach these homes. Declaration of Marc Billingsley at ¶ 30 (Exh. 6).

<sup>13</sup> See *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the*

**C. Entergy's Conduct In Arkansas Is Consistent With The Same Conduct Entergy Has Engaged In Other States—Conduct The Commission Has Already Found To Be Unlawful.**

36. Entergy's unlawful conduct is part of a bigger picture of utility conduct just that directed at the Arkansas Complainants. Entergy's actions in Arkansas are similar or identical to successful complaints that cable operators in Texas, Mississippi and Arkansas brought before this Commission in the late 1990s. Entergy's recidivism warrants prompt and decisive Commission action.

37. Entergy has imposed its unjust, unreasonable and discriminatory terms and conditions in essentially two ways: (a) by conducting a safety audit *after* the operator has completed a system upgrade or re-build;<sup>14</sup> or (b) by conditioning approvals for aerial upgrades on paying for USS' surveys and the resulting "violations" remediation.<sup>15</sup>

**1. Comcast, Alliance Communications and WEHCO Video have already completed or have substantially completed improvements to their systems**

38. Comcast, Alliance Communications and WEHCO Video have each essentially completed their upgrades or construction and are therefore dealing with the first category of unlawful conduct: Entergy/USS' safety audits. These operators completed their upgrades more than one year before the majority of the inspections took place.<sup>16</sup>

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*Commission's Rules and Policies Governing Pole Attachments ("Telecom Order")*, 13 FCC Rcd. 6777, at ¶ 2 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.").

<sup>14</sup> Declaration of Marc Billingsley at ¶¶ 11-14 (Exh. 6); Declaration of Bennett Hooks at ¶ 7 (Exh. 4); Declaration of Jeff Gould at ¶¶ 14-18 (Exh. 3); Declaration of Charlotte Dial at ¶¶ 12-14 (Exh. 5).

<sup>15</sup> Declaration of Marc Billingsley at ¶ 28 (Exh. 6); Declaration of Bennett Hooks at ¶ 41 (Exh. 4).

<sup>16</sup> Declaration of Marc Billingsley at ¶¶ 11-14 (Exh. 6); Declaration of Bennett Hooks at ¶¶ 7-10 (Exh. 4); Declaration of Charlotte Dial at ¶ 29 (Exh. 5).

39. At this point, Entergy has completed the bulk of the Comcast and Alliance audits, and is now undertaking its audit of WEHCO plant.<sup>17</sup>

40. As addressed in greater detail below, for more than two years, Comcast and Alliance have been attempting to negotiate with Entergy regarding both the reasonableness of the charges that Entergy imposed on them, as well as certain engineering conditions and plant corrections Entergy is requiring.<sup>18</sup> During this time, Entergy refused to allow either Alliance or Comcast to make *any* new attachments to Entergy's poles until USS charges are paid and all, what Entergy calls violations, are cleared.<sup>19</sup>

41. These are an unjust, unreasonable and discriminatory terms or conditions of attachment in violation of 47 U.S.C. § 224(f), and inflict irreparable harm on Complainants and rural broadband deployment in Arkansas.<sup>20</sup>

42. Entergy has not yet conditioned WEHCO's access to poles on payment of survey and remediation costs. However, Entergy is imposing what are essentially the same unreasonable terms and conditions of attachment that Entergy imposed on Alliance and Comcast. As a result, WEHCO is confronting the same exposure as its fellow Association members, Comcast and Alliance, with regard to unreasonable inspection charges and safety requirements.<sup>21</sup>

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<sup>17</sup> Declaration of Marc Billingsley at ¶ 19 (Exh. 6) ; Declaration of Bennett Hooks at ¶ 20 (Exh. 4); Declaration of Charlotte Dial at ¶ 29 (Exh. 5).

<sup>18</sup> See, e.g., Letter from J. D. Thomas and Genevieve Sapir, Counsel for Alliance, to Wm Webster Darling, Senior Counsel, Entergy, dated January 17, 2003, attached hereto as Exhibit 10. See also Letter from J. D. Thomas and Genevieve Sapir, Counsel for Alliance, to Wm Webster Darling, Senior Counsel, Entergy, dated December 15, 2003 attached hereto as Exhibit 11; Letter from J. D. Thomas and Genevieve Sapir, Counsel for Alliance, to Wm Webster Darling, Senior Counsel, Entergy, dated December 18, 2003 attached hereto as Exhibit 12.

<sup>19</sup> See Letter from Wm. Webster Darling, Senior Counsel, Entergy, to John Brinker, Vice President of Operations, Alliance, dated December 16, 2002 (Exh. 7); Email from an email from John Tabor, USS, to James Peacock, contractor for Comcast, dated March 12, 2003 (Exh. 8); Email from Tony Wagoner, USS, to Marc Billingsley, Comcast, and James Peacock dated February 6, 2003 (Exh. 9).

<sup>20</sup> Declaration of Marc Billingsley at ¶¶ 27-32 (Exh. 6); Declaration of Bennett Hooks at ¶¶ 39-47 (Exh. 4). See also Letter from Wm. Webster Darling, Counsel for Entergy, to John Brinker, Vice President of Operations, Alliance, dated December 16, 2002 (Exh. 7).

<sup>21</sup> Declaration of Charlotte Dial at ¶¶ 23-24 (Exh. 5).

## **2. Cox has completed improvements in some areas, but is continuing work in others**

43. The remaining cable operator complainant, Cox, falls victim to both categories of Entergy's conduct. It has completed improvements of its systems in approximately thirteen Arkansas communities, where it anticipates that it eventually will be subject to a USS safety audit, but is still rebuilding several other systems.<sup>22</sup> Where Cox is still improving its systems, such as it is doing in Russellville, Entergy has conditioned Cox's upgrade on complying with Entergy's plant clean-up initiative.<sup>23</sup>

44. In 2001 or 2002, EAI retained USS to conduct a comprehensive survey of cable plant—on the poles for years—in Arkansas without seeking cable operator input.<sup>24</sup>

45. The false pretext for the survey was Entergy's claim that Complainants' engineering, construction and maintenance practices are deficient and warrant a complete safety audit at the Complainants' expense. However, throughout the parties' twenty-year relationships, Entergy had never raised safety issues related to the cable operators' engineering, construction and maintenance practices until USS became involved.<sup>25</sup>

46. From the beginning, the scope of the surveys (whether for purported safety reasons or in anticipation of a Cox rebuild) was far beyond that which is reasonable. USS collected extremely detailed information (*see* Paragraphs 288-289) about all of EAI's poles, including those without cable television attachments.<sup>26</sup>

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<sup>22</sup> Declaration of Jeff Gould at ¶¶ 8-9 (Exh. 3).

<sup>23</sup> *See id.* at ¶ 30.

<sup>24</sup> Declaration of Ronnie Colvin at ¶ 10 (Exh. 16); Declaration of Bennett Hooks at ¶ 8 (Exh. 4); Declaration of Jeff Gould at ¶ 10 (Exh. 3); Declaration of Charlotte Dial at ¶¶ 6-7 (Exh. 5).

<sup>25</sup> Declaration of Marc Billingsley at ¶ 9 (Exh. 6); Declaration of Bennett Hooks at ¶ 8 (Exh. 4); Declaration of Jeff Gould at ¶ 13 (Exh. 3); Declaration of Charlotte Dial at ¶ 10 (Exh. 5).

<sup>26</sup> Declaration of Marc Billingsley at ¶ 33 (Exh. 6). *See also* Complaint, ¶¶ 318-325.

47. Entergy/USS also surveyed poles owned by other utilities with which Complainants have independent relationships and separate attachment agreements.<sup>27</sup>

48. The inspections cover not just Complainants' facilities attached to the poles but also those of EAI *and* telephone attachments located on both Entergy poles *and* telephone-owned poles.<sup>28</sup>

49. As indicated, Complainant Cox Communications, while not yet subject to a safety audit, has been forced to pay exorbitant USS inspection and clean-up charges throughout its Arkansas system rebuilds. It is facing identical—or worse—practices in its impending Russellville, Arkansas upgrade—a project Entergy and USS have unreasonably delayed for more than five months.

50. Despite the fact that the scope of the survey includes information about a) poles that do not belong to Entergy b) poles without cable television attachments and c) attachments that belong to other attachers, Entergy requires the cable operators to pay the overwhelming majority of all of the survey costs whether or not they relate to or benefit cable.

51. These are unjust, unreasonable and discriminatory terms and conditions of attachment that violate 47 U.S.C § 224. Indeed, in *Cable Texas, Inc. v. Entergy Services, Inc.*, the Commission stated in no uncertain terms that “Entergy cannot engage a contractor to perform a pole count and disregard the cost because [the cable operator] is paying for it.”<sup>29</sup>

52. Essentially, Entergy has taken the basic principles the FCC rejected in *Cable Texas, Inc. v. Entergy Services, Inc.* and has applied them to the Arkansas cable operators on a far grander scale.<sup>30</sup> For example, in the Arkansas inspections, EAI initially provided only non-

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<sup>27</sup> See Declaration of Marc Billingsley at ¶ 46 (Exh. 6).

<sup>28</sup> See *id.*

<sup>29</sup> See 14 FCC Rcd. 6647, ¶ 14 (1999).

<sup>30</sup> See 14 FCC Rcd. 6647 (1999).

itemized bills to Complainants, effectively masking many of its unlawful charges.<sup>31</sup> After over a year of requesting itemization and refusing to pay unsupported bills, EAI finally produced itemized bills.<sup>32</sup>

53. At this point, the *Cable Texas*-style abuses became readily apparent: EAI has attempted to pass through approximately \$1.9 million in excessive contractor charges to Cable Operator Complainants.<sup>33</sup> The vast majority of these charges should not be assessed as one-time non-recurring charges, but must be, under federal law, recovered by Entergy from *all* attachers through pole rent carrying charges.<sup>34</sup>

**D. Entergy's Surveys are Grossly Inaccurate and Premised on Unreasonable And Discriminatory Engineering Requirements Far In Excess Of Prevailing Industry Standards**

54. In addition to the unreasonable costs for the inspections and efforts to cover them up, Entergy/USS' inspections are rife with errors and inaccuracies, including missed poles and defective inspections, measurements and analysis.<sup>35</sup> In fact, the quality of the inspections completed by USS has been so grossly inadequate that some Complainants have been forced to conduct a complete re-audit of their systems at their own expense.<sup>36</sup>

55. Furthermore, Entergy and USS have inflated safety violations and assessed responsibility for them by radically departing from the parties' past practices and industry

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<sup>31</sup> Declaration of Marc Billingsley at ¶ 37 (Exh. 6); Declaration of Jeff Gould at ¶ 21 (Exh. 3); See Letter from Charlotte Dial, Administrative Manager, WEHCO, to Entergy Arkansas, Inc. dated September 30, 2004, attached hereto as Exhibit 13; Letter from Charlotte Dial, Administrative Manager, WEHCO, to Entergy Arkansas, Inc. dated October 27, 2004, attached hereto as Exhibit 14.

<sup>32</sup> See ¶¶ 106-107, 185-186 *infra*; Declaration of Marc Billingsley at ¶ 37 (Exh. 6).

<sup>33</sup> Declaration of Marc Billingsley at ¶ 15 (Exh. 6); Declaration of Bennett Hooks at ¶ 19 (Exh. 4); Declaration of Jeff Gould at ¶ 20 (Exh. 3); Declaration of Charlotte Dial at ¶ 23 (Exh. 5).

<sup>34</sup> See *Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, at ¶¶ 14-16 (2003), *recon. denied*, 18 FCC Rcd. 22287 (Oct. 29, 2003).

<sup>35</sup> Declaration of Marc Billingsley at ¶¶ 38, 66-68 (Exh. 6); Declaration of Bennett Hooks at ¶ 36-37 (Exh. 4).

<sup>36</sup> Declaration of Marc Billingsley at ¶ 39 (Exh. 6); Declaration of Bennett Hooks at ¶ 38 (Exh. 4).

standards.<sup>37</sup> The vast majority of the conditions Entergy/USS identified as alleged “safety violations” are not violations of any established safety code (including the National Electrical Safety Code (“NESC”) which has been adopted by the State of Arkansas)<sup>38</sup> but in fact are consistent with decades of practice throughout the industry and in Arkansas.<sup>39</sup>

56. One of the biggest factors inflating Entergy/USS’ tally of “violations” is Entergy/USS’ failure to apply the grandfathering principles of the NESC and Arkansas law with respect to Complainants’ facilities.<sup>40</sup> This requirement is a violation of the NESC itself and constitutes an unjust and unreasonable term or condition of attachment. Indeed, the FCC ruled just last year that it is unreasonable for USS not to provide cable operators the benefit of grandfathering.<sup>41</sup>

57. Ironically, while Entergy/USS is requiring Complainants to modify their facilities to comply with ongoing revisions of the NESC, even if they were in compliance with the NESC standards in place at the time of installation,<sup>42</sup> Entergy has taken the position that the “grandfathering” provisions of the NESC (or National Electrical Code (“NEC”)) apply with respect to *its own* service drops to residential structures.<sup>43</sup> Moreover, on information and belief, Entergy/USS does not apply the stringent clearance requirements demanded from the Complainants to itself (or to telephone attachers such as SBC or Alltel).

58. Many of the allegedly non-compliant conditions Entergy/USS cited are not true “safety” violations affecting the health, safety and welfare of workers or the public, and include

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<sup>37</sup> Harrelson Report at p. 18, attached hereto as Exhibit 15.

<sup>38</sup> See 126 03 Ark. Reg. 011; Ark. Code Ann. §§ 11-5-303, 11-5-304, 23-17-236.

<sup>39</sup> Harrelson Report at p. 12 (Exh. 15).

<sup>40</sup> The NESC (and the Arkansas Code) contain a “grandfathering” provision that provides that attachments must comply with the safety standards in effect at the time of the original installation. See ¶¶ 246-253, *infra*

<sup>41</sup> *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24615, ¶ 39 (2003) (“*Knology*”).

<sup>42</sup> Declaration of Marc Billingsley at ¶ 40 (Exh. 6); Declaration of Bennett Hooks at ¶¶ 21-22 (Exh. 4); Declaration of Jeff Gould at ¶ 32 (Exh. 3); Declaration of Charlotte Dial at ¶ 11 (Exh. 5).

<sup>43</sup> Declaration of Bennett Hooks at ¶ 28 (Exh. 4).

declaring “tree trimming,” use of Entergy anchors (which historically had been permitted), even removal of a dead squirrel, as well as many other items to be “violations.”

59. Entergy/USS’ application of code requirements is discriminatory. Citing Complainants’ failure to comply with these grossly unreasonable construction standards, EAI has instituted a permit freeze on several Cable Operator Complainants until each pole in the circuit is brought into “compliance” with EAI standards.<sup>44</sup> On information and belief, Entergy has not instituted a similar permitting freeze on the telephone companies.

60. Equally troubling (and unlawful), Entergy is not adhering to its safety standards with respect to its own plant.<sup>45</sup> Entergy has provided no sound rationale for exempting its own electrical current carrying facilities—which are inherently more dangerous than communications cables—from the NESC’s safety standards.

61. Complainants have tried to cooperate in good faith with EAI by correcting many thousands of identified “violations,” including those that do not constitute violations under a proper application of the Code and/or have been accepted practices throughout the parties’ relationships.<sup>46</sup> However, this cooperation has done little or nothing to satisfy Entergy/USS.

62. In many cases, the ability to correct violations is out of the Complainants’ control. For example, on some poles, the Complainants cannot correct a “violation” without other

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<sup>44</sup> See Letter from W. Darling, Entergy, to J. Brinker, Alliance, dated December 16, 2002 (Exh. 7); Email from John Tabor, USS, to James Peacock, contractor for Comcast, dated March 12, 2003 (“At this time Entergy is not releasing any permits for attachment for Comcast until the circuit that the request resides in is brought into compliance.”) (Exh. 8); Email from Tony Wagoner, USS, to Marc Billingsley, Comcast, and James Peacock dated February 6, 2003 (acknowledging that while Comcast has permission to be in the right of way, Entergy is denying Comcast’s request to attach) (Exh. 9). While Entergy has purported to have lifted the freeze, the fact remains that it conditionally granted attachment applications to a mere 23 poles over the course of two years. And this was done only because of the looming threat of litigation.

<sup>45</sup> See, e.g., Declaration of Bennett Hooks at ¶ 28-29 (Exh. 4).

<sup>46</sup> Declaration of Marc Billingsley at ¶ 19 (Exh. 6); Declaration of Bennett Hooks at ¶ 22 (Exh. 4); Declaration of Jeff Gould at ¶ 33 (Exh. 3); Declaration of Charlotte Dial at ¶ 27 (Exh. 5).

attachers, including Entergy, performing make-ready.<sup>47</sup> On numerous occasions, Complainants have made make-ready requests, including pre-payments, to EAI that go unprocessed for extended periods. It is virtually impossible for Complainants to ever clear the violations under these circumstances without Entergy/USS' cooperation.<sup>48</sup>

63. Further compounding the Complainants' difficulties is that, following the correction of "violations," USS re-inspects and often identifies additional "violations" it overlooked initially. This unnecessarily delays the cable operators' ability to upgrade networks and significantly increases costs.<sup>49</sup>

64. Most troublesome, Entergy today is constructing its electric facilities with utter disregard for safety, in violation of the NESC and federal law.<sup>50</sup>

#### **E. Entergy Is Thwarting Rural Broadband and Competition In Arkansas**

65. The Commission has consistently recognized the need to foster the rapid deployment of advanced communications services, particularly in rural areas such as Arkansas.<sup>51</sup> To meet that need, many cable companies, including the Cable Operator Complainants, have sought to upgrade their systems in order to offer consumers advanced communications services

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<sup>47</sup> Declaration of Jeff Gould at ¶ 32 (Exh. 3).

<sup>48</sup> See *id.*

<sup>49</sup> For example, in Little Rock, of the 106 estimated circuits inspected by USS over the past two and one half years, not one circuit has been cleared by EAI and USS and the permitting freeze continues in full force. This is so despite the correction by Comcast of some 7,500 "violations" and the expenditure of a significant sum on its engineering support firm to sort out the USS inspections. Declaration of Marc Billingsley at ¶¶ 20, 65 (Exh. 6).

<sup>50</sup> See 47 U.S.C. § 224(h); see also Declaration of Jeff Gould at ¶ 37 (Exh. 3).

<sup>51</sup> See, e.g., *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Band, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd. 14165, at ¶ 321 (2004) (acknowledging the need "to ensure prompt delivery of service to rural areas" and "to promote the availability of broadband to all Americans"). *In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers, Memorandum Opinion and Order*, 15 FCC Rcd. 8726, at ¶ 9 (2000) (instituting rules "to further the rapid deployment of new technologies for the best of the public including those residing in rural areas") (quoting *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21831, at ¶ 15 (1996)).

such as high-speed Internet, and Video on Demand, and to prepare for Voice-over IP ("VoIP") telephone services.<sup>52</sup> Cable operators around the Nation, including those in Arkansas, have been working diligently to do so.

66. Once these facilities are constructed, and then upgraded, the work of cable operators to provide their services to customers continues. Even though the vast majority of cable television system attachment construction has been completed for *at least* 15 or more years,<sup>53</sup> the deployment of advanced digital and two-way services often requires new equipment or facilities that can accommodate increased bandwidth.

67. To affect these upgrades cable operators *must* have reasonable pole access to expand their aerial cable plant.

68. In turn, rural consumers' only opportunity for broadband services, including high-speed modem and VoIP platforms, is through the cable operators' upgraded service offerings, which obviously cannot occur when the pole owner clocks access as Entergy has done for two years.

#### **F. Relief Requested for Both Categories of Complainants**

69. Whether post-upgrade safety audit, or injected as a mandatory component of a cable system upgrade, Entergy's practices are unjust, unreasonable and unlawful and Complainants are entitled to all the relief requested in this Complaint, which includes:

- a. declaring the permitting freeze to be an unlawful and discriminatory denial of access in violation of 47 U.S.C. § 224 and directing EAI to immediately begin processing Complainants applications for pole attachments;

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<sup>52</sup> Declaration of Marc Billingsley at ¶ 12 (Exh. 6); Declaration of Bennett Hooks at ¶ 7 (Exh. 4); Declaration of Jeff Gould at ¶ 14 (Exh. 3); Declaration of Charlotte Dial at ¶ 12 (Exh. 5).

<sup>53</sup> Declaration of Marc Billingsley at ¶ 7 (Exh. 6); Declaration of Bennett Hooks at ¶ 8 (Exh. 4); Declaration of Jeff Gould at ¶ 10 (Exh. 3); Declaration of Charlotte Dial at ¶¶ 6-7 (Exh. 5).